Supreme Court of the United States

EDGAR S. APPLEBY and JOHN S. APPLEBY, individually and Executors of the Last Will and Testament of CHARLES E. APPLEBY, deceased,

Petitioners,

against

THE CITY OF NEW YORK and others,

Respondents.

Brief in opposition to petition for Writ of Certiorari.

STATEMENT.

(References are to the Record before the Court of Appeals of the State of New York).

The petitioners, through grants to their predecessors in title from The City of New York (Exhibits 4 & 5, pp. 367 to 387) acquired title to certain land under the waters of the Hudson River between 39th and 40th Streets and 40th and 41st Streets, in the Borough of Manhattan, City of New York. These grants extended from the original high water line to

the proposed 13th Avenue, which had been laid out over the water pursuant to an act of the legislature (See maps pp. 369 and 379).

Each of these grants contained the following provisions:

> "And the said party of the second part, for himself, his heirs and assigns, doth hereby covenant and agree to and with the said parties of the first part, their successors and assigns, that the said party of the second part, his heirs and assigns shall and will within three months next after he or they shall be thereunto required by the said parties of the first part, or their successors, at his or their own proper costs and charges build, erect, make and finish or cause to be built, erected, made and finished according to any resolution or ordinance of the said parties of the first part, or their successors, already passed or adopted, four good and sufficient Bulk-heads, Wharves, Streets and Avenues which shall form so much and such parts of the Twelfth and Thirteenth Avenues, and Thirty-ninth and Fortieth Streets as fall within the limits of the premises above described, and are reserved as aforesaid, from out thereof for public streets and will fill in the same with good and sufficient earth and regulate and pave the same and lay the sidewalks thereof." (fols. 1111-1113; 1143-1145)
>
> "And it is hereby further covenanted and agreed, by and between the parties to these presents, and the true intent and meaning hereof, is that the said party of the second

part, his heirs and assigns will not build the said wharves, bulkheads, avenues or streets herein before mentioned or any part thereof, or make the lands in conformity with the covenants hereinafter mentioned until permission for that purpose shall be first had, and obtained from the said parties of the first part, or their successors, and will not build or erect or cause to be built or erected any wharf or pier or other obstruction in the Hudson River in front of the hereby granted premises without the permission of the said parties of the first part, their successors or assigns, first had for that purpose." (fols. 1119-1120; 1151-1152).

"And it is hereby further agreed by and between the parties to these presents, and the true intent and meaning hereof, is that this present grant and every word or thing in the same contained shall not be construed or taken to be a covenant or covenants of warranty or of seizen, of said parties of the first part or their successors or to operate further than to pass the estate right, title of interest they may have or may lawfully claim in the premises hereby conveyed by virtue of their several charters and the various acts of the Legislature of the People of the State of New York." (fols. 1122-1123; 1155-1156).

The petitioners or their predecessors in title made the streets and filled in the lands between them out to about the easterly or inshore line of 12th Avenue (fol. 530) and the land so filled

in is not here in controversy. Beyond the easterly line of 12th Avenue, the land granted is still covered with water.

The title which the City conveyed to the petitioners' predecessors in title came to the City in part by grant from colonial governors and in part by grant from the State of New York (fols. 514 to 521).

The City of New York, at its own expense, has built piers at the foots of 39th, 40th and 41st Streets, within the prolonged lines of these streets, title to which was reserved to the City in the grants to petitioners' predecessors (fols. 1103-1104, 1142). The City has leased these piers, and its lessees have been mooring vessels at the sides of these piers over the petitioners' land under water. The City has also dredged the spaces between the piers to facilitate the navigation of vessels (fols. 542-543). The floating of vessels over petitioners' land under water and the dredging of the slips constitute the injuries complained of.

The petitioner sued to enjoin the acts of the City and its lessees, and the Courts of New York have, with an unimportant exception hereinafter noted, denied them relief. The decision was based upon the construction of the grants to petitioners' predecessors, and upon the right of the public authorities to regulate the use of the waterfront.

See opinion of the Court of Appeals attached to the petition; reported 235 N. Y. 351.

It further appears that in 1890 the Secretary of War, acting under authority of Congress, established a bulkhead line parallel with and 150

feet westerly of the westerly line of 12th Avenue (fols. 577-578). The Secretary subsequently established a pierhead line 700 feet outshore of the bulkhead line and entirely outshore of the property in controversy (fol. 544; see map, page 529).

Pursuant to the provisions of Section 6 of Chapter 574 of the laws of New York of 1871, certain officials, acting on behalf of the State of New York, adopted a plan for the improvement of the waterfront at the locality in question, by which plan a bulhead line or line of solid filling, parallel with and 150 feet westerly from the westerly line of 12th Avenue, was established. (fols. 576-578). This line is coincident with that of the Secretary of War. The plan also provided for a pierhead line 500 feet beyond the bulkhead line, and for piers 80 feet in width at the foot of 39th Street, 40th Street and 41st Street, extending westerly from the bulkhead line to the pierhead line, and for slips or basins between the piers (Exhibit 11, p. 391).

By the establishment of the bulkhead line, under the authority of both the Federal and State governments, a limit was placed upon the extent to which anyone might place solid filling in the waters of the River, and by the adoption of the plan providing for the location and widths of the piers, a limit was placed upon the right to erect such structures.

Summarizing the situation, we find that the City of New York owns the land under water within the prolonged lines of the three streets, and the petitioners own the lands under water between the streets. A bulkhead line has been

laid down by concurrent authority of the Federal and State governments about 250 feet outshore of the present line of solid filling. All are agreed that solid filling may be carried out to that line without violating any regulation of either government. The Federal government has also laid down a pierhead line 700 feet outshore of the bulkhead line. Between the bulkhead line and the pierhead line, the State has undertaken further to regulate the building of wharf and pier structures. It has provided that piers shall be built only at the foots of the streets. It so happens that the State's regulation requires the building of piers on the city's property, and forbids the building of any structures on petitioner's property beyond the bulkhead line. The city has built the piers on its property. The waters covering petitioners' property, beyond the bulkhead line, are thus part of the navigable waters of the river, which the Courts of New York have held may be used by vessels making fast to the city's piers, and may be dredged to facilitate navigation.

POINT I.

There has been no erroneous interpretation of any law of The United States by the Courts of New York.

The petitioners contend that a Federal question is raised because the construction of the act of Congress authorizing the Secretary of War

to establish harbor lines is involved. The fact of the establishment of harbor lines by the Secretary of War, and the legal effect of the same, is conceded by all parties. All parties agree that none of them may fill with solid filling beyond the bulkhead line established by the Secretary of War, and that none of them may construct piers extending beyond the pierhead line established by him. There is no controversy whatever respecting the meaning, scope, or effect of any act of Congress.

POINT II.

No question respecting the taking of property or the impairment of the obligation of a contract is involved in this case.

The Courts of New York have held that the title of the City of New York, and therefore the title of the petitioners, to the land under the waters of the Hudson River is not absolute and unqualified, but is subject to such regulations as the public authorities may impose respecting the use of the waterfront.

The determination with respect to the nature of the title follows similar decisions made in prior cases, which will be referred to under Point II *infra*.

Upon the question of regulation, it is manifest that there must be some control by the public authorities of the right to fill in navigable waters and the building of piers and wharves. This

control ordinarily takes the form of establishing harbor lines, bulkhead lines to limit the extent of solid filling, and pier lines to limit the extent, width and location of piers.

As we have stated, the Secretary of War, acting under the authority of Congress, in 1890, established a bulkhead line 150 feet west of the westerly side of 12th Avenue and approximately 250 feet west of the present line of solid fill. The petitioners concede that they are bound by this line and may not fill beyond it. This concession is based upon numerous decisions of this Court, some of which are

Scranton vs. *Wheeler* 179 U. S. 141, 163,
Cummings vs. *Chicago* 188 U. S. 410,
Calumet Grain Co. vs *Chicago*, 188 U. S. 431,
Greenleaf Lumber Co. vs. *Garrison* 237 U. S. 251.

The Courts of New York have restrained the City and the other defendants from interfering with the petitioners' rights inshore of the bulkhead line, (Fols. 606, 1662), and the defendants do not seek to review such determination. It thus appears that the controversy in the present case deals entirely with the land under water outshore of the bulkhead line.

The only regulation by the Federal government outshore of the bulkhead line is the pierhead line established by the Secretary of War, a considerable distance beyond the lands in controversy, (fol. 544, maps pp. 529, 531). This is a line limiting the outer extremity of the piers

to be built. The petitioners base no complaint upon the establishment of such line.

Petitioners' sole ground of complaint is the establishment, by the state authorities, inshore of the Federal pier line, of limitations respecting the width and location of piers. The plan adopted by the State provides for piers at the foots of the streets, and for slips between the piers. The petitioners complain that they are thus deprived of their property, and that their contract rights have been impaired.

This Court has held that a state has the power to further restrict the building of piers and wharves inshore of the Federal harbor lines, and that no one may improve the waterfront without complying with the regulations of both the Federal and the State governments.

Montgomery vs. *Portland* 190 U. S. 89.

Manifestly, there must be some regulation of the width of piers and the distances between them. When the Secretary of War established the pier line 700 feet outshore of the bulkhead line, this was done in order to permit the building of long piers and the mooring of vessels at the sides of the piers. If there were no restriction with respect to the location or width of piers, the entire space between the bulkhead and pierhead lines might be covered by wharf structures, thus effectually preventing the use of any part of them other than their outshore ends. The determination of the questions respecting the location of piers and the spaces between them has been left to the State, and the State has provided the necessary regulations.

It follows from the nature of the title of the petitioners and the undoubted power of the public authorities to regulate the use of navigable waters, that no legal injury has been done to the petitioners.

The petitioners admit that they are bound by the lines laid down by Congress through the instrumentality of the Secretary of War. Why then are they not equally bound by the regulations of the State of New York through the instrumentality of the officials selected by its legislature?

The regulatory acts of the State affect all. All must use their property in the manner provided by the regulatory authority. All land under navigable waters is subject to regulation with respect to the manner of its improvement. This is absolutely necessary in order that proper provision may be made for navigation. If one owner gains and another loses by the exercise of the State's regulatory power, this is merely incidental. All general regulations similarly help one and hurt another. The only proper consideration in matters of this kind is for the needs of the general public. The State's power, within its proper sphere, must be as great as that of the Federal government. True, the State may not permit improvement where the Federal government forbids. But the State may further restrict within the area as to which the Federal government has manifested its indifference. No one may fill in beyond the Federal bulkhead line. But the State may prohibit filling even farther inshore. No one may extend a pier beyond the Federal pierhead line. But the State

may say that, within such line, the piers must be so far apart or only in certain specified locations.

A case closely analogous to the case at bar is *Greenleaf Lumber Co.* vs. *Garrison* 237 U. S. 251. There it appeared that the complainant had constructed an improvement in the waters of the Elizabeth River consisting of two fills, with the outer extremities connected, thus making a three sided wharf with a log pond in the centre. This improvement was entirely inshore of a harbor line adopted by the Secretary of War in 1890. In 1911 the Secretary established a new line farther inshore, cutting off about 200 feet of complainant's structure. This Court held that that the complainant was obliged to comply with the new line and remove the portions of his wharf extending beyond it, and that the action of the public authorities was not a taking of property, but the lawful exercise of a governmental power for the common good.

So, in the case at bar, no property of the petitioners has been taken. Their grants from the City have not been impaired. They have merely been construed to be subject to the regulatory power of the Federal and State governments. This doctrine has already received the approval of this Court in the *Greenleaf Lumber Co.* case *supra*, and if it had not, it is sufficiently supported by reason to survive the test applied in cases of contract impairment.

> "In such circumstances, although we construe the constitution for ourselves and determine the existence or non-existence of the

contract set up and whether its obligation has been impaired by the State enactment, *Douglas* vs. *Kentucky* 168 U. S. 488, 502, 'the Federal Courts will lean towards an agreement of views with the State Courts if the question seems to them balanced with doubt', a principle reinforced by the later cases".

Tampa Water Works vs. *Tampa* 199 U. S. 241, 243-244.

"Although we all agree that in this class of cases it is our duty to see that parties are not deprived of their constitutional rights under the guise of construction, still the mere fact that without the State decision we might have hesitated is not enough to lead us to overrule that decision upon a fairly doubtful point."

Southern Wisconsin Ry. vs. *Madison* 240 U. S. 457, 461.

POINT III.

There has been no change in the decisions of the State Courts upon the questions here involved.

There is nothing new in the doctrine announced by the Court of Appeals in the case at bar that the title of the City of New York and its grantees in the lands under water here in

question is not absolute and unqualified but is subject to the rights of the public. This doctrine had been previously announced in *Knickerbocker Ice Co.* vs. *Forty-Second Street R. Co.* 176 N. Y. 408, as follows:

> "There are several fundamental facts which must be kept in view in the effort to adjust the rights of the parties to this litigation. *First.* The title of The City of New York in the tideway and submerged lands of the Hudson River granted under the Dongan and Montgomerie Charters, and the acts of the legislatures of 1807, 1826 and 1837, was not absolute and unqualified, but was and is held subject to the right of the public to the use of the river as a water highway." (176 N. Y. p. 417)

This doctrine was reiterated in almost the same words in *American Ice Co.* vs. *The City of New York* 217 N. Y. 402 at p. 405.

In *Coxe* vs. *The State*, the Court of Appeals stated:

> "The title of the State to the seacoast and the shores of tidal rivers is different from the fee simple which an individual holds to an estate in lands. It is not a proprietary, but a sovereign right, and it has been frequently said that a trust is engrafted upon this title for the benefit of the public, of which the state is powerless to divest itself." (144 N. Y. at pp. 405 to 406).

Moreover, the case at bar finds an exact pre-

cedent in *People* vs. *N. Y. & S. I. Ferry Co.* 68 N. Y. 71. In that case, the defendant claimed lands under water under a grant made by the State, pursuant to certain acts of the legislature. Before the defendant had constructed any improvements, the legislature passed a law providing that no pier might be built within 100 feet of another pier. The defendant constructed a pier upon the land granted to it, within 100 feet of a similar structure upon the adjoining property. The Court of Appeals held that the construction of such pier was in violation of the State law, and that the State might require its removal. It was pointed out that the grant to defendant's predecessors did not exclude the exercise by the State of governmental control of the waters as a public highway, and that, if the State, in exercising this control, restricted the grantee in his use of the property, it was not in contravention of the grant.

See also *Matter of Public Service Commission*, 224 N. Y., 211.

The petitioners contend that a different rule is to be found in other cases decided by the Court of Appeals, for example, *Langdon* vs. *The Mayor* 93 N. Y. 129 and *Williams* vs. *The Mayor* 105 N. Y. 419. In these and similar cases it appeared that the lands granted *had been fully filled in*, and had thus ceased to be within the domain of the regulatory power over navigable waters. The decisions last above referred to apply, for example, to the land of the petitioners east of 12th Avenue, which we admit neither the State nor the City has the power to disturb. In the case at bar, Judge Pound, referring to this line of cases, said:

"Much that has been said in the cases as to the absolute and uncontrolled power of the State to grant the navigable waters for private purposes as it may grant the dry land it owns is *dictum* (*People* v. *Steeplechase Park Co.*, 218 N. Y. 459; *Langdon* v. *Mayor*, 93 N. Y. 129), and in conflict with rules laid down in other well-considered cases which hold that the so-called *jus privatum*, or absolute ownership of lands under navigable waters, together with the exclusive privilege in the waters themselves, which attached to the English crown, resides in the people in their sovereign capacity and cannot be conveyed for private purposes. (Citing cases)" 235 N. Y. at page 362.

If a Federal question arose every time a State Court refused to follow its own prior *dictum*, what would be the condition of the docket of this Court?

The petition for the writ of certiorari herein should be denied.

New York, September, 1923.

Respectfully submited,

GEORGE P. NICHOLSON,
Corporation Counsel,
Attorney for the City of New York.

CHARLES J. NEHRBAS,
of Counsel.

(20176)

Supreme Court of the United States

OCTOBER TERM, 1925—No. 15.

EDGAR S. APPLEBY and JOHN S. APPLEBY, individually and as executors of Charles E. Appleby, deceased,
Plaintiffs-in-error,

against

THE CITY OF NEW YORK, *et al.*,
Defendants-in-error.

BRIEF ON BEHALF OF THE CITY OF NEW YORK, DEFENDANT-IN-ERROR.

GEORGE P. NICHOLSON,
Corporation Counsel.

CHARLES J. NEHRBAS,
Of Counsel.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

SUBJECT INDEX.

LIST OF CASES CITED.

Supreme Court of the United States

No. 15.

October Term, 1925.

Edgar S. Appleby and John S. Appleby, individually and as executors of the last will and testament of Charles E. Appleby, deceased,
Plaintiffs-in-Error,

vs.

The City of New York, *et al.*,
Defendants-in-Error.

In Error to the Supreme Court of the State of New York.

BRIEF ON BEHALF OF THE CITY OF NEW YORK, DEFENDANT-IN-ERROR.

In addition to the writ of error, the plaintiffs-in-error filed, at the October, 1923, term, a petition for a writ of certiorari. The court deferred consideration of such petition until the hearing upon the writ of error.

Plaintiffs-in-error seek to review a judgment of the Supreme Court of the State of New York (R., pp. 551-552) entered upon an order of the Appellate Division of that

court (R., pp. 549-551). The judgment so entered has been affirmed by the Court of Appeals of New York (R., pp. b-c). The order of the Court of Appeals affirming the judgment below has been, according to the practice, made the order and judgment of the Supreme Court (R., pp. a-b).

The judgment sought to be reviewed modifies and affirms a judgment of the Special Term of the Supreme Court and enjoins the defendants in error from interfering in certain particulars with the property of plaintiffs-in-error, but substantially denies the relief demanded in the complaint.

Statement of the Case.

Plaintiffs-in-error, claiming to be the owners "in fee simple absolute" of certain lands under water between 39th and 40th Streets, and between 40th and 41st Streets, outshore of Twelfth Avenue, in the Borough of Manhattan, City of New York, brought this action,

(a) to restrain the defendants from mooring, docking or floating vessels over the lands under water, and

(b) to require the removal of certain piers, sheds, etc., at the foots of 39th, 40th, and 41st Streets.

The plaintiffs also demand money damages (see Complaint, R., pp. 9-61).

The City of New York answered (R., pp. 62-84) denying the material allegations of the complaint, and setting up the establishment of harbor lines affecting the premises in question, the statute of limitations, adverse possession, and the failure of the plaintiffs to comply with the conditions contained in their grants from the City.

The premises in question are under the waters of the Hudson River, on the westerly side of Manhattan Island.

By Chapter 182 of the Laws of New York of 1837, Thirteenth Avenue, as laid out on a certain map made by George B. Smith was declared to be the permanent exterior street or avenue in the City of New York, along the easterly shore of the Hudson River, between the southerly line of Hammond Street and the northerly line of 135th Street, and the City of New York was vested with all the right and title of the people of the State to the lands under water extending from the westerly line of the lands heretofore granted to the westerly line of Thirteenth Avenue as so laid out (R., pp. 172-174).

The title to the premises in question was thus vested in the City of New York. This is alleged in the complaint (R., pp. 12-13) and is not disputed.

On or about the 24th day of December, 1852, the City issued to one Robert Latou a water grant covering lands under water between Fortieth and Forty-first Streets from the high water mark of the Hudson River out to Thirteenth Avenue, established by Chapter 182 of the Laws of 1837 (Pltff.'s Ex. 5; R., pp. 378-387; Finding, R., pp. 182-191).

The grant contains the following pertinent provisions:

> "Saving and reserving from and out of the hereby granted premises so much thereof as by said map annexed forms parts or portions of the Twelfth and Thirteenth avenues and Fortieth and Forty-first streets for the uses and purposes of public streets, avenues and highways as hereinafter mentioned" (R., p. 381).
>
> "And the said party of the second part, for himself, his heirs and assigns, doth hereby covenant and agree to and with the said parties of the first part,

their successors and assigns, that the said party of the second part, his heirs and assigns shall and will within three months next after he or they shall be thereunto required by the said parties of the first part, or their successors, at his or their own proper costs and charges build, erect, make and finish or cause to be built, erected, made and finished according to any resolution or ordinance of the said parties of the first part, or their successors, already passed or adopted, or that may hereafter be passed or adopted, four good and sufficient Bulk-heads, Wharves, Streets or Avenues which shall form so much and such parts of the Twelfth and Thirteenth Avenues, and Fortieth and Forty-first Streets as fall within the limits of the premises first above described, and are reserved as aforesaid, from out thereof for public streets and will fill in the same with good and sufficient earth and regulate and pave the same and lay the sidewalks thereof." (R., pp. 381-382.)

"And it is hereby further covenanted and agreed, by and between the parties to these presents, and the true intent and meaning hereof, is that the said party of the second part, his heirs and assigns will not build the said wharves, bulkheads, avenues or streets herein before mentioned or any part thereof, or make the lands in conformity with the covenants hereinafter mentioned until permission for that purpose shall be first had, and obtained from the said parties of the first part, or their successors, and will not build or erect or cause to be built or erected any wharf or pier or other obstruction in the Hudson River in front of the hereby granted premises without the permission of the said parties of the first part, their successors or assigns, first had for that purpose." (R., p. 384.)

"And it is hereby further agreed by and between the parties to these presents, and the true intent and

meaning hereof, is that this present grant and every word or thing in the same contained shall not be construed or taken to be a covenant or covenants of warranty or of seizen, of said parties of the first part or their successors or to operate further than to pass the estate right, title or interest they may have or may lawfully claim in the premises hereby conveyed by virtue of their several charters and the various acts of the Legislature of the People of the State of New York." (R., pp. 385-386.)

Subsequently, on the first day of August, 1853, a similar grant was issued to Charles E. Appleby of the lands under water between Thirty-ninth and Fortieth Streets, from the high water mark out to Thirteenth Avenue (R., pp. 367-377; Finding, p. 191).

The title of the plaintiffs comes down from these grants (R., pp. 191-192).

In 1890, the Secretary of War, acting under authority of Congress, established a bulkhead line parallel with and 150 feet to the west of the westerly line of Twelfth Avenue (R., p. 193). The Secretary has also established a pierhead line 700 feet to the west of the bulkhead line, which pier line is beyond Thirteenth Avenue and wholly outshore of the premises in controversy (R., p. 182; see map, p. 529).

Pursuant to the provisions of Section 6 of Chapter 574 of the laws of New York of 1871, certain officials, acting on behalf of the State of New York, adopted a plan for the improvement of the waterfront at the locality in question, by which plan a bulkhead line or line of solid filling was established coincident with the bulkhead line of the Secretary of War (R., p. 193). The plan of the state authorities also provided for a pierhead line 500 feet beyond the bulkhead

line, and for piers 80 feet in width at the foots of 39th, 40th and 41st Streets, extending from the bulkhead line to the pierhead line, and for slips or basins between the piers (Ex. 11, p. 391).

By the establishment of the bulkhead line, under authority of both the Federal and State governments, a limit was placed upon the extent to which anyone might place solid filling in the waters of the River, and by the adoption of the plan providing for the location and widths of the piers, a limit was placed upon the right to erect such structures.

The plaintiffs or their predecessors in title have made the streets and filled in the lands, as provided in the grants from the city, as far out as the easterly or inshore line of 12th Avenue (R., p. 177). The land so filled is not here in controversy. Beyond the easterly line of 12th Avenue, the land granted is still under water. The controversy deals with this submerged land.

The City of New York, at its own expense, has built piers at the foots of 39th, 40th and 41st Streets, as provided for in the plan heretofore referred to (R., pp. 180, 181, 192). The land under water covered by these piers was reserved from the grants made to plaintiffs' predecessors (R., pp. 368, 381). The city has leased these piers and its lessees have been mooring vessels at the sides of the piers over the plaintiffs' land under water (R., pp. 465-487). The City has also dredged the spaces between the piers to facilitate the navigation of vessels (R., p. 181). The floating of vessels over plaintiffs' land under water and the dredging of the slips constitute the injuries complained of.

In the court of original jurisdiction, the Special Term of the Supreme Court, the city was enjoined from dredging the slips and from doing other acts not now in controversy

(R., p. 202). The opinion of the Special Term is printed at pages 356-362).

Both parties appealed to the Appellate Division of the Supreme Court, where the judgment was modified by eliminating the provision enjoining the city from dredging west of the established bulkhead line, and in all other respects affirmed (R., pp. 551-552). The opinion of the Appellate Division is printed at pages 555-563 and is reported in 199 N. Y. App. Div. 539.

Both parties again appealed to the Court of Appeals, where the judgment was affirmed (R., pp. b-c). The opinion of the Court of Appeals is printed at pp. 565-569 and is reported in 235 N. Y. 351.

Summarizing the situation, we find that the City of New York, deriving its title from the State, has granted to the plaintiffs' predecessors the land under water between 39th and 40th Streets, and between 40th and 41st Streets, and has reserved to itself the land under water within the prolonged lines of the streets. A bulkhead line has been established by concurrent action of the Federal and State authorities, which limits solid filling at a point 150 feet west of Twelfth Avenue. Beyond the bulkhead line, and within the pierhead line established by the Federal Government, the State has provided that piers shall be built only within the prolonged lines of the streets. The State's regulation permits the building of piers on the city's property and prohibits the building of any structures on the plaintiffs' property beyond the bulkhead line. The city has built the piers on its property. The waters covering the plaintiffs' intervening property, beyond the bulkhead line, are part of the navigable waters of the river. The courts of New York have held that these waters may be navigated by vessels making fast to the city's piers, and may be dredged to facilitate navigation.

POINT I.

There has been no erroneous interpretation of any law of the United States by the Courts of New York.

The plaintiffs-in-error contend that a Federal question is raised because the construction of the Act of Congress authorizing the Secretary of War to establish harbor lines is involved. The fact of the establishment of harbor lines by the Secretary of War, and the legal effect of the same, are conceded by all parties. All parties agree that none of them may fill with solid filling beyond the bulkhead line established by the Secretary of War, and that none of them may construct piers extending beyond the pierhead line established by him. There is no controversy whatever respecting the meaning, scope, or effect of any act of Congress.

POINT II.

No question respecting the taking of property or the impairment of the obligation of a contract is involved in this case.

The Courts of New York have held that the title of the City of New York, and therefore the title of the plaintiffs, to the land under the waters of the Hudson River is not absolute and unqualified, but is subject to such regulations as the public authorities may impose respecting the use of the waterfront.

The determination with respect to the nature of the title follows similar decisions made in prior cases, which will be referred to under Point III, *infra*.

Upon the question of regulation, it is manifest that there must be some control by the public authorities of the right to fill in navigable waters and the building of piers and wharves. This control ordinarily takes the form of establishing harbor lines, bulkhead lines to limit the extent of solid filling, and pier lines to limit the extent, width and location of piers.

As we have stated, the Secretary of War, acting under the authority of Congress, in 1890, established a bulkhead line 150 feet west of the westerly side of 12th Avenue and approximately 250 feet west of the present line of solid fill. The plaintiffs concede that they are bound by this line and may not fill beyond it. This concession is based upon numerous decisions of this Court, some of which are

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The only regulation by the Federal government outshore of the bulkhead line is the pierhead line established

by the Secretary of War, a considerable distance beyond the lands in controversy (R., p. 182, maps pp. 529, 531). This is a line limiting the outer extremity of the piers to be built. The plaintiffs base no complaint upon the establishment of such line.

Plaintiffs' sole ground of complaint is the establishment, by the State authorities, inshore of the Federal pier line, of limitations respecting the width and location of piers. The plan adopted by the State provides for piers at the foots of the streets, and for slips between the piers. The plaintiffs complain that they are thus deprived of their property, and that their contract rights have been impaired.

This Court has held that a state has the power to restrict the building of piers and wharves where the Federal government has made no restrictions, or where the State's regulations do not conflict with those of the United States.

Montgomery v. *Portland*, 190 U. S. 89.

Manifestly, there must be some regulation of the width of piers and the distances between them. When the Secretary of War established the pier line 700 feet outshore of the bulkhead line, this was done in order to permit the building of long piers and the mooring of vessels at the sides of the piers. If there were no restriction with respect to the location or width of piers, the entire space between the bulkhead and pierhead lines might be covered by wharf structures, thus effectually preventing the use of any part of them other than their outshore ends. The determination of the questions respecting the location of piers and the spaces between them has been left to the State, and the State has provided the necessary regulations.

It follows from the nature of the title of the plaintiffs and the undoubted power of the public authorities to regulate the use of navigable waters, that no legal injury has been done to the plaintiffs.

The plaintiffs admit that they are bound by the lines laid down by Congress through the instrumentality of the Secretary of War. Why then are they not equally bound by the regulations of the State of New York through the instrumentality of the officials selected by its legislature?

The regulatory acts of the State affect all. All must use their property in the manner provided by the regulatory authority. All land under navigable waters is subject to regulation with respect to the manner of its improvement. This is absolutely necessary in order that proper provision may be made for navigation. If one owner gains and another loses by the exercise of the State's regulatory power, this is merely incidental. All general regulations similarly help one and hurt another. The only proper consideration in matters of this kind is for the needs of the general public. The State's power, within its proper sphere, must be as great as that of the Federal government. True, the State may not permit improvement where the Federal government forbids. But the State may further restrict within the area as to which the Federal government has manifested its indifference. No one may extend a pier beyond the Federal pierhead line. But the State may say that, within such line, the piers must be so far apart or only in certain specified locations.

A case closely analogous to the case at bar is *Greenleaf Lumber Co.* v. *Garrison*, 237 U. S. 251. There it appeared that the complainant had constructed an improvement in the waters of the Elizabeth River consisting of

two fills, with the outer extremities connected, thus making a three sided wharf with a log pond in the centre. This improvement was entirely inshore of a harbor line adopted by the Secretary of War in 1890. In 1911 the Secretary established a new line farther inshore, cutting off about 200 feet of complainant's structure. This Court held that the complainant was obliged to comply with the new line and remove the portions of his wharf extending beyond it, and that the action of the public authorities was not a taking of property, but the lawful exercise of a governmental power for the common good.

So, in the case at bar, no property of the plaintiffs has been taken. Their grants from the City have not been impaired. They have merely been construed to be subject to the regulatory power of the Federal and State governments. This doctrine has already received the approval of this Court in the *Greenleaf Lumber Co.* case *supra*, and if it had not, it is sufficiently supported by reason to survive the test applied in cases of contract impairment.

> "In such circumstances, although we construe the constitution for ourselves and determine the existence or non-existence of the contract set up and whether its obligation has been impaired by the State enactment, *Douglas* vs. *Kentucky*, 168 U. S. 488, 502, 'the Federal Courts will lean towards an agreement of views with the State Courts if the question seems to them balanced with doubt', a principle reinforced by the later cases."
>
> *Tampa Water Works* v. *Tampa*, 199 U. S. 241, 243-244.

"Although we all agree that in this class of cases it is our duty to see that parties are not deprived of their

constitutional rights under the guise of construction, still the mere fact that without the State decision we might have hesitated is not enough to lead us to overrule that decision upon a fairly doubtful point."

Southern Wisconsin Ry. v. *Madison*, 240 U. S. 457, 461.

POINT III.

There has been no change in the decisions of the State Courts upon the questions here involved.

There is nothing new in the doctrine announced by the Court of Appeals in the case at bar that the title of the City of New York and its grantees in the lands under water here in question is not absolute and unqualified but is subject to the rights of the public. This doctrine had been previously announced in *Knickerbocker Ice Co.* v. *Forty-Second Street R. Co.*, 176 N. Y. 408, as follows:

"There are several fundamental facts which must be kept in view in the effort to adjust the rights of the parties to this litigation. *First*: The title of the City of New York in the tideway and submerged lands of the Hudson River granted under the Dongan and Montgomerie charters and the acts of the legislatures of 1807, 1826 and 1837, was not absolute and unqualified, but was and is held subject to the right of the public to the use of the river as a water highway. (*Sage* v. *Mayor, etc. of N. Y.*, 154 N. Y. 70; *Matter of City of N. Y.*, 168 N. Y., 139.) *Second*: The title of the city of New York in and to the lands within its public streets is held in trust for the public use. (*Story* v. *N. Y. El. R. R. Co.*, 90 N. Y. 122;

Kane v. *N. Y. El. R. R. Co.*, 125 N. Y., 165). *Third*: The general public has a right of passage over the places where land highways and navigable waters meet; and when a wharf or bulkhead is built at the end of a land highway and into the adjacent waters, the highway is by operation of law extended by the length of the added structure. (*People* v. *Lambier*, 5 Denio 9; *Matter of City of Brooklyn*, 73 N. Y. 179). *Fourth*: It was competent for the legislature in granting additional submerged lands to the city of New York in 1837, to prescribe that such lands should be used for the purposes of an exterior street, to which other streets then intersecting the river should be extended."

176 N. Y., p. 417.

In

American Ice Co. v. *City of New York*, 217 N. Y., 402,

the same property was involved as in the case of *Knickerbocker Ice Co.* (*supra*). The Court's opinion contains the following discussion of the nature of the property rights in the land under water.

"A large number of the facts found relating to the title and interest of the city were reviewed by this court in the earlier cases (*Knickerbocker Ice Company* v. *42nd Street & G. St. F. R. R. Co.*, 176 N. Y., 408; *Matter of Mayor, etc. of N. Y.*, 193 N. Y. 503) wherein it was determined that the title of the city of New York in the tideway and the submerged lands of the Hudson river granted under the Dongan and Montgomerie charters and the acts of the legislature (Laws of 1807, chapter 115; Laws 1837, chapter 182), and by grants made by the state to the city was not absolute and unqualified, but was and is held subject

to the rights of the public to the use of the river as a water highway; that the title of the city of New York in and to the lands within its public streets (including Forty-third street to which the city acquired title in 1837-1838, and was opened from the East river to the high-water mark of the Hudson river, sixty feet in width), is held in trust for the public use; that the general public has a right of passage over the places where land, highways and navigable waters meet; and when a wharf or bulkhead is built at the end of a land highway and into the adjacent waters, the highway is, by operation of law, extended by the length of the added structure; that it was competent for the legislature in granting additional submerged lands to the city of New York in 1837 to prescribe that such lands should be used for the purposes of an exterior street to which other streets then intersecting the river should be extended. (*Knickerbocker Ice Company* v. *42nd Street & G. St. F. R. R. Co.*, 176 N. Y., 408, 417)."

217 N. Y., pp. 405, 406.

"The title of the state to the seacoast and the shores of tidal rivers is different from the fee simple which an individual holds to an estate in lands. It is not a proprietary, but a sovereign right, and it has been frequently said that a trust is engrafted upon this title for the benefit of the public of which the state is powerless to divest itself."

Coxe v. *State*, 144 N. Y., at pp. 405-406.

Moreover, the case at bar finds an exact precedent in *People* v. *N. Y. & S. I. Ferry Co.*, 68 N. Y. 71. In that case the defendant claimed lands under water under a grant made by the State, pursuant to certain acts of the legislature. Before the defendant had constructed any improve-

ments, the legislature passed a law providing that no pier might be built within 100 feet of another pier. The defendant constructed a pier upon the land granted to it, within 100 feet of a similar structure upon the adjoining property. The Court of Appeals held that the construction of such pier was in violation of the State law, and that the State might require its removal. From the opinion of the Court, we quote the following:

> "The grant to Gore contained no words excluding the exercise by the State of governmental control of the waters above the land granted as a public highway, and if, in exercising this control, the grantee is restricted in the use of his property, it is not in contravention of the grant, but consistent with it, because the grant, by well settled words of construction was subject to the exercise of this right and attribute of sovereignty. We need not inquire what the rights of a grantee would be in respect to piers and wharves, erected under the license implied from the grant before it had been revoked, or the State had, in the exercise of its discretion, made regulations upon the subject.
>
> The legislature, by chapter 763 of the Laws of 1857, entitled 'An act to establish bulkhead and pier lines for the port of New York,' established pier and bulkhead lines for the port and harbor of New York which included the premises granted to Gore. The second section is as follows: 'It shall not be lawful to fill in with earth or other solid material in the waters of said port beyond the bulkhead line, or line of solid filling hereby established, nor shall it be lawful to erect any structure exterior to the said bulkhead line, except the sea wall mentioned in the first section of the act, and piers which shall not exceed seventy feet in width respectively with inter-

vening water spaces of at least 100 feet, nor shall it be lawful to extend such pier or piers beyond the exterior or pier line, nor beyond or outside of said sea wall.'

When this act was passed no piers had been erected on the Gore grant, and so far as appears, there was unity of title as to the whole tract embraced therein. This act was a lawful exercise of legislative power, as a regulation for the benefit of commerce and navigation, and the owners of the Gore grant were bound to observe it, and in erecting piers to conform to its directions."

68 N. Y., at pp. 79-80.

The title of the City being limited by the regulatory power of the State and Federal Governments, it could convey to plaintiffs' predecessors no greater title. The plaintiffs, therefore, hold the property subject to regulation of its use by the Secretary of War and the State authorities.

The plaintiffs rely greatly upon the case of *People* v. *Steeplechase Park Co.*, 218 N. Y. 459. It was there held that the State has the power to convey such title to the foreshore as will permit the grantee to erect structures which prevent the passage of the public. There is nothing in that case which is inconsistent with our contention in the case at bar. It did not involve the question of the State's regulatory power. It does not follow, from anything that was said in that case, that the grantee would not have been obliged to conform his improvement of the lands granted to any harbor lines which might have been established. As we stated at the outset, we do not claim that the plaintiffs did not acquire a fee. They acquired as great a title as an individual can have in lands under navigable waters. But something more than a mere con-

veyance of the lands is required before it can be argued that the State has surrendered its power of regulation.

The plaintiffs also contend that a different rule is to be found in other cases decided by the Court of Appeals, for example, *Langdon* v. *The Mayor*, 93 N. Y. 129, and *Williams* v. *The Mayor*, 105 N. Y. 419. In these and similar cases it appeared that the lands granted *had been fully filled in*, and had thus ceased to be within the domain of the regulatory power over navigable waters. The decisions last above referred to apply, for example, to the land of the plaintiffs east of 12th Avenue, which we admit neither the State nor the City has the power to disturb. In the case at bar, Judge Pound, referring to this line of cases, said:

> "If plaintiffs' lands easterly of the bulkhead line had been actually filled in they would no longer be lands under water and would be free from the regulatory power of the state (*First Construction Co.* v. *State*, 221 N. Y. 295), but so long as they remained under water they were subject to the sovereign power of the state to regulate their use for purposes of navigation. * * *
>
> "Much that has been said in the cases as to the absolute and uncontrolled power of the State to grant the navigable waters for private purposes as it may grant the dry land it owns is *dictum* (*People* v. *Steeplechase Park Co.*, 218 N. Y. 459; *Langdon* v. *Mayor*, 93 N. Y. 129), and in conflict with rules laid down in other well-considered cases which hold that the so-called *jus privatum*, or absolute ownership of lands under navigable waters, together with the exclusive privilege in the waters themselves, which attached to the English crown, resides in the people in their sovereign capacity and cannot be conveyed for

> private purposes (Citing cases)" 235 N. Y., at pages 361-362.

The plaintiffs have contended that the waters covering their lands are not navigable. References to depths of water of as little as four feet are made. They are, however, part of the Hudson River, which, we all know, is a navigable stream. Being such, the right of regulation extends to its full width. It is precisely in the more shallow portions, near the banks, that regulation is most necessary, and most frequently exercised. To hold, for example, that a bulkhead line may be placed only where the water has a certain depth, would be to deprive the governmental au-authorities of all discretion in the matter. It is for them to say, once it is determined that the stream, generally, is navigable, how near to the bank the limit of navigation shall be. And this limiting line, or bulkhead line, may be drawn wherever there is water, no matter how shallow. This Court, in discussing the power of Congress, has stated:

> "When Congress acts, necessarily its power extends to the whole expanse of the stream, and is not dependent upon the depth or shallowness of the water. To recognize such distinction would be to limit the power when and where its exercise might be most needed."
>
> *Greenleaf-Johnson Lumber Co.* v. *Garrison*, 237 U. S. 251, 263.

It is quite clear, we think, that the plaintiffs have merely a naked fee with respect to the lands in question. They may not devote them to any profitable use. They lie under the navigable waters of the Hudson River. As such they may be used by the public for the purposes of navigation,

and the lessees of adjacent piers may moor vessels alongside such piers and over the plaintiffs' lands. This follows from what has heretofore been said, and was expressly decided in

Coffin v. *Scott*, 19 *Weekly Digest*, 413; aff'd 102 N. Y. 730.

The opinion in that case is not reported in full, but we have attached a copy as an appendix to this brief.

The doctrine of the New York cases on this subject is not new, and is in accordance with the decisions of this Court.

Martin *v.* Waddell, 16 Pet. 367.

Shively *v.* Bowlby, 152 U. S. 1 (see pp. 20 to 21 where the law of New York is discussed).

In the last named case the Court stated:

> "The later judgments of this Court clearly establish that the title and rights of riprarian or littoral proprietors in the soil below high water mark of navigable waters are governed by the local laws of the several states, subject, of course, to the rights granted to the United States by the Constitution."
>
> 152 U. S., at p. 40.
>
> "Lands under tide waters are incapable of cultivation or improvement in the manner of lands above high water mark. They are of great value to the public for the purposes of commerce, navigation and fishery. Their improvement by individuals, when permitted, is incidental or subordinate to the public use and right. Therefore, the title and control of them are vested in the sovereign for the benefit of the whole people."
>
> 152 U. S., at p. 57.

It has often been stated that the State may grant land under water in such a manner and under such circumstances that the grantee becomes a proprietor to the same extent as a proprietor of upland. This may be true where the land under water granted consists of shallows unsuitable for general navigation, and where the grantee has actually filled in the lands and made upland of them. This is the situation with respect to so much of the lands granted to plaintiffs' predecessors as lie east of 12th Avenue. They have been filled in and are now as much part of the upland of Manhattan Island as any other portion of that Island. No one questions this. It may be conceded, as a general proposition, that where an owner has lawfully filled in land under water with the consent of both the Federal and State authorities it becomes upland, free from the trust subject to which land under water is held, and free from the regulatory power of the State over navigable waters. Judge Pound recognized this principle in the case at bar, when he said:

> "If plaintiffs' lands easterly of the bulkhead line had been actually filled in, they would no longer be lands under water, and would be free from the regulatory power of the State."
>
> 235 N. Y., at pp. 361, 362.

The consent of the Federal and State authorities is evidenced by the establishment of bulkhead lines, lines to which solid filling is permitted. By the establishment of such lines, the authorities define the limits of a navigable waterway. In permitting the conversion into upland of land under water inshore of a bulkhead line, navigation is not interfered with nor obstructed. On the contrary, it is

facilitated. Modern commerce could not be accommodated in a harbor which remained in its natural condition, with sloping beaches and mud flats along its edge. By permitting filling out to a reasonable depth of water vessels are enabled to moor alongside the shore or at piers extending therefrom.

Outshore of the bulkhead line, however, we are in navigable waters. Here, every private right is subordinate to the rights of the public. All ownership is subject to public regulation. No right, whether of ownership or otherwise, can be granted which will prevent the full and free exercise of the regulatory power of Congress and of the State.

This is all that the Courts have held in the case at bar. With respect to the filled lands inshore of the bulkhead line, it is conceded that the regulatory power no longer exists, for they are no longer part of the navigable waters of the River. They have become upland. Outshore of the bulkhead line, however, no structure may be placed without the approval of the authorities. The Secretary of War has limited the distance to which piers may be extended; the State has prescribed their location and width. This is neither a taking of property nor an infringement of the plaintiffs' granted rights. It is an exercise of sovereign power to which all land under navigable waters is subject.

> Prosser *v.* Northern Pacific R. Co., 152 U. S. 59; Greenleaf Johnson Co. *v.* Garrison, 237 U. S., 251.

POINT IV.

The piers and sheds at the foot of 39th, 40th and 41st Streets are lawfully maintained.

Plaintiffs contend that the piers in question are in the beds of public streets and constitute a diversion of the same from street uses. This contention overlooks the fact that, under regulations both of the Federal and State governments, there may be no solid filling beyond a point about 150 feet west of Twelfth Avenue. Where there can be no solid filling, obviously there can be no public street.

Plaintiffs complain that we have built piers instead of a street. Any structure except a pier would be a violation of governmental regulations, a purpresture and a nuisance.

Peo. v. *Vanderbilt*, 26 N. Y., 287; 28 N. Y., 396.

The contention that the fee title of the beds of the streets was not reserved by the City at the time of making the grants is completely answered by

The Mayor, etc., v. *Law*, 6 N. Y. Supp., 628; 125 N. Y., 380;

Burns Bros. v. *City of N. Y.*, 178 App. Div., 615, aff'd., 232 N. Y., 523.

The City has the right to lease the piers.

Matter of City of New York, 135 N. Y. 253, 264.

POINT V.

The lands under water in controversy may be dredged to facilitate navigation.

Lands under navigable waters may be dredged, to facilitate navigation, without any liability to the owner of the fee of the underlying lands.

Lewis Blue Point Co. v. *Briggs*, 198 N. Y. 287; aff'd. 229 U. S. 82;
Tempel v. *United States*, 248 U. S. 121.

The judgment should be affirmed.

New York, October, 1925.

Respectfully submitted,

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